Dato' Tan Chin Woh v Dato' Yalumallai @ M Ramalingam s/o V Muthusamy

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-43–08 OF 2013
ARIFIN ZAKARIA CHIEF JUSTICE, ZULKEFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), SURIYADI AND ABU SAMAH NORDIN FCJJ
28 JULY 2016

Civil Procedure — Appeal — Appeal to Federal Court — Whether Court of Appeal erred or misdirected itself in invoking defence of absolute privilege which neither pleaded nor raised before High Court — Whether Court of Appeal had discretion to allow an appeal on any ground even though it was not canvassed before High Court — Natural justice — Whether Court of Appeal failed to give appellant right of hearing — Whether there was breach of rules of natural justice

The respondent lodged a police report claiming that the appellant and a law firm had been involved in a conspiracy to cheat him. Subsequently the respondent wrote a letter of complaint to the advocates and solicitors disciplinary board ('DB') against members of the law firm which had been involved in the alleged conspiracy. The appellant claimed that this letter to the DB had contained derogatory references about him. The appellant, who took offence at the contents of the letter of complaint and the police report, sent a letter of demand to the respondent. The letter of demand required the respondent to, inter alia, withdraw the letter of complaint, tender an apology and pay damages to the appellant. When the respondent failed to respond to the letter of demand, the appellant commenced this action. The High Court judge allowed the appellant's claim and ordered the respondent to pay general, aggravated and exemplary damages, totaling RM230,000. The respondent appealed to the Court of Appeal. The Court of Appeal held that the contents of the police report and the complaint to the DB were both protected by the defence of absolute privilege and hence not actionable in law. Consequently, the Court of Appeal allowed the respondent's appeal with no order as to costs. The appellant has obtained leave to proceed with the present appeal. In this appeal the appellant submitted that the Court of Appeal had erred or misdirected itself in invoking the defence of absolute privilege which was neither pleaded nor raised by the respondent in the trial before the High Court. It was also the appellant's case that the Court of Appeal in arriving at its decision had failed to give the appellant the right of hearing. The respondent contended that even though it had not pleaded absolute privilege, the Court of Appeal was correct in holding that the respondent's defence was sufficiently broad to sustain the defence of absolute privilege. The respondent also

submitted that s 69(4) of the Courts of Judicature Act 1964 ('the CJA') had given the Court of Appeal the power to allow an appeal on any ground even though it was not canvassed before the High Court.

Held, allowing the appeal with costs:

(1) While it is true that the Court of Appeal could consider a point not expressly taken in the memorandum of appeal or argued in the court below based on the broad wording of s 69(4) of the CJA and r 18(2) of the Rules of the Court of Appeal 1994, this was subject to the overriding discretion of the court to do justice. Where the justice of the case required a departure from the rule that parties should be bound by the grounds in the memorandum of appeal, the court could allow a new point to be argued. However, in so doing, it was not the duty of the Court of Appeal, to invent or create a cause of action or a defence under the guise of doing justice for the parties as it was also trite that parties in litigation were bound by the four corners of their pleadings. In the present case the Court of Appeal had, in the purported exercise of its discretion under s 69(4) of the CJA, substituted the defence of qualified privilege with that of absolute privilege, when this defence was never pleaded nor raised before the High Court. From the authorities and the plain reading of s 69(4) of the CJA, the power of the Court of Appeal was only to draw inferences of facts and to make an order which ought to have been made by the High Court. The power was essentially limited to making of inferences of facts from the facts as found by the High Court. Section 69(4) of the CJA did not confer on the Court of Appeal the power to substitute pleadings of the party in any circumstance as this would be contrary to the cardinal principle in civil litigation, that parties were bound by their pleadings. Thus, in the circumstances of the present case, the Court of Appeal had erred or misdirected itself in invoking the defence of absolute privilege, which was never pleaded nor raised in the trial before the High Court (see paras 12–16).

(2) Based on the transcript of proceedings, which was not challenged by the respondent, it was clear that the Court of Appeal had failed to give the appellant the right to reply on the defence of absolute privilege. In the circumstances, the Court of Appeal had acted contrary to the rules of natural justice. In an adversarial system, parties should be given the right of hearing or the right to present their case before the court. This was to assist the court in coming to its decision. Whenever the court proposed to consider a fresh issue, which the court considered pertinent to the case before it, it should give the parties the right to make submissions on the proposed issue before arriving at its finding. This was fundamental in the adversarial system that we practise in this country but had not been adopted in this case. In invoking the defence of absolute privilege the

Court of Appeal had failed to give the appellant the right of rebuttal. This was a flagrant breach of the rules of natural justice thus occasioning a failure of justice (see paras 19–22).

(3) In view of these findings it was not necessary to consider the other two issues raised by the appellant in this appeal (see para 23).

[Bahasa Malaysia summary

Responden telah membuat laporan polis mendakwa bahawa perayu dan satu firma guaman telah terlibat dalam konspirasi untuk menipunya. Berikutan itu responden telah menulis surat aduan kepada peguambela dan peguamcara lembaga tatatertib ('LT') terhadap ahli-ahli firma guaman yang terlibat dalam konspirasi yang dikatakan itu. Perayu mendakwa bahawa surat ini kepada LT itu mengandungi rujukan menghina tentangnya. Perayu, yang kecewa dengan kandungan surat aduan itu dan laporan polis itu, telah menghantar surat tuntutan kepada responden. Surat tuntutan itu menghendaki responden untuk, antara lain, menarik balik surat aduan itu, menender satu permohonan maaf dan membayar ganti rugi kepada perayu. Apabila responden telah gagal untuk menjawab surat tuntutan itu, perayu telah memulakan tindakan ini. Hakim Mahkamah Tinggi telah membenarkan tuntutan perayu dan memerintahkan responden membayar ganti rugi am, tambahan dan teladan, berjumlah RM230,000. Responden telah merayu kepada Mahkamah Rayuan. Mahkamah Rayuan telah memutuskan bahawa kandungan laporan polis dan aduan kepada LT kedua-duanya dilindungi oleh pembelaan perlindungan mutlak dan justeru tidak boleh diambil tindakan di sisi undang-undang. Berikutan itu, Mahkamah Rayuan telah membenarkan rayuan responden tanpa perintah untuk kos. Perayu telah memperoleh kebenaran untuk meneruskan rayuan ini. Dalam rayuan ini perayu berhujah bahawa Mahkamah Rayuan terkhilaf atau salah arah dengan sendirinya kerana menggunakan pembelaan perlindungan mutlak yang mana tidak mempli perlindungan mutlak, Mahkamah Rayuan adalah betul dalam memutuskan bahawa pembelaan responden cukup luas utuk mengekalkan pembelaan perlindungan mutlak. Responden juga berhujah bahawa s 69(4) Akta Mahkamah Kehakiman 1964 ('AMK') telah memberikan Mahkamah Rayuan kuasa untuk membenarkan rayuan atas apa-apa alasan meskipun ia tidak dikemukakan di hadapan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos:

(1) Manakala ia adalah benar bahawa Mahkamah Rayuan boleh mengambil kira perkara yang tidak dinyatakan dalam memorandum rayuan atau dihujahkan di mahkamah bawahan berdasarkan kata-kata luas s 69(4) AMK dan k 18(2) Kaedah-Kaedah Mahkamah Rayuan 1994, ini adalah tertakluk kepada budi bicara mahkamah untuk melakukan keadilan. Di mana keadilan kes memerlukan pelepasan daripada peraturan bahawa pihak-pihak patut terikat dengan alasan dalam memorandum rayuan itu,

A mahkamah akan membenarkan perkara baru dihujahkan. Walau bagaimanapun, dalam berbuat demikian, ia bukan kewajipan Mahkamah Rayuan, untuk mencipta dan mewujudkan kausa tindakan atau pembelaan di bawah samaran melakukan keadilan untuk pihak-pihak tersebut kerana ia juga lapuk bahawa pihak-pihak dalam B litigasi terikat oleh pliding mereka. Dalam kes ini Mahkamah Rayuan telah, dalam menjalankan budi bicaranya di bawah s 69(4) AMK, menggantikan pembelaan perlindungan bersyarat dengan perlindungan mutlak, walhal pembelaan ini tidak pernah dipli atau ditimbulkan di hadapan Mahkamah Tingi. Berdasarkan autoriti-autoriti dan bacaan C biasa s 69(4) AMK, kuasa Mahkamah Rayuan hanya untuk membuat inferens fakta dan untuk membuat perintah yang sepatutnya dibuat oleh Mahkamah Tinggi. Kuasa tersebut pada dasarnya terhad untuk membuat inferens fakta berdasarkan fakta seperti yang didapati oleh Mahkamah D Tinggi. Seksyen 69(4) AMK tidak memberikan kuasa kepada Mahkamah Rayuan untuk menggantikan pliding pihak dalam apa-apa keadaan kerana ia bertentangan dengan prinsip cardinal dalam litigasi sivil, bahawa pihak-pihak terikat oleh pliding mereka. Oleh itu, dalam keadaan kes ini, Mahkamah Rayuan terkhilaf atau salah arah sendirinya E kerana menggunakan pembelaan perlindungan mutlak, yang mana tidak pernah dipli atau ditimbulkan dalam perbicaraan di hadapan Mahkamah Tinggi (lihat perenggan 12–16).

(2) Berdasarkan transkrip prosiding, yang tidak dicabar oleh responden, ia F adalah jelas bahawa Mahkamah Rayuan telah gagal memberikan perayu hak untuk menjawab pembelaan perlindungan mutlak itu. Dalam keadaan sedemikian, Mahkamah Rayuan telah bertindak bertentangan rukun keadilan asasi. Dalam sistem adversarial, pihak-pihak patut diberikan hak didengar atau ha untuk mengemukakan kes mereka di G hadapan mahkamah. Ini adalah untuk membantu mahkamah membuat keputusan. Bila-bila masa mahkamah mencadangkan untuk mempertimbangkan isu baru, yang mahkamah anggap penting kepada kes di hadapannya, ia patut memberikan pihak-pihak hak untuk membuat hujah berhubung isu yang dicadangkan sebelum membuat H penemuannya. Ini adalah penting dalam sistem adversarial yang diamalkan di negara ini tetapi tidak diguna pakai dalam kes ini. Dalam menggunakan pembelaan perlindungan mutlak Mahkamah Rayuan telah gagal memberi perayu hak untuk mematah. Ini jelas pelanggaran rukun keadilan asasi yang mengakibatkan kegagalan keadilan (lihat I perenggan 19–22).

(3) Berdasarkan penemuan-penemuan tersebut maka tidak perlu untuk mempertimbangkan dua isu lain yang ditimbulkan oleh perayu dalam rayuan ini (lihat perenggan 23).]

Notes

For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 955–988.

Cases referred to

Amanah Butler (M) Sdn Bhd v Yike Chee Wah [1997] 1 MLJ 750, CA (refd)
Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457; [1995] 4 CLJ 127, CA (refd)
Hoecheng Products Co Ltd v Cargill Hong Kong Ltd [1995] 1 WLR 404, PC (refd)
Len Min Kong v United Malayan Banking Corp Bhd and another appeal [1998] 2 MLJ 478, CA (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (refd)
Mohd Azam Shuja & Ors v United Malayan Banking Corporation Bhd [1995] 2 MLJ 851; [1995] 1 CLJ 861, CA (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293, FC (refd)
RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)
Ramanathan a/l Chelliah v PP [2009] 6 MLJ 215; [2009] 6 CLJ 55, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69, 69(4)
Rules of the Court of Appeal 1994 r 18(2)

Yusuf Khan bin Ghows Khan (Yusuf Khan & Fong) for the appellant.
Dhanaraj Vasudevan (Kalaiselvi M with him) (Kamil Hashim Pury & Lim) for the respondent.

Arifin Zakaria Chief Justice (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of Appeal dated 20 September 2012 which allowed the respondent's appeal. Leave to appeal was granted by this court on 18 June 2013 and 29 July 2015 on the following four questions of law:

(i) whether a person on an occasion of privilege as between himself and some other person, makes some defamatory statement affecting a third person who has nothing to do with the privilege occasion, that third person would have a right of action against that person making the defamatory statement?

(ii) whether the defence of qualified privilege which apply to a defamatory statement made on an occasion of privilege applies to a republication thereof to a third party?

(iii) having regard to the established principle that parties are bound by their pleadings, may the Court of Appeal hearing an appeal against the decision of the High Court, invoke s 69(4) of the Courts of Judicature Act 1964 to substitute the defence as pleaded in the case before the High Court with another defence which was neither pleaded nor raised before the High Court? and

(iv) whether an appellate court, after having confined the parties on an appeal before it, to only one issue of defence in law for purpose of the appeal, may then avail the appellant another issue of defence which the said appellant had never pleaded nor raised in the court of first instance, to allow the appellant's appeal, based on the issue of defence in law which the Court of Appeal availed to the appellant under s 69(4) of the Courts of Judicature Act 1964?

[2] In this ground of judgment, the appellant is referred to as the plaintiff and the respondent as the defendant, as in the High Court.

BACKGROUND FACTS

[3] On 14 December 1998, a police report was lodged by the defendant. The contents of the police report included an allegation of a conspiracy to cheat the defendant purportedly perpetrated by the law firms of Messrs A Zahari Kanapathy Thulasi, together with the plaintiff.

[4] Following this, the defendant sent a letter of complaint dated 25 August 1999 to the advocates and solicitors disciplinary board ('DB') against members of the law firm. This letter contained references to the plaintiff in a derogatory manner. The plaintiff was the client of the solicitors, at the material time, against whom the complaint was lodged.

[5] The plaintiff took offence at the contents of the letter of complaint and the police report. A letter of demand was sent to the defendant, through his then solicitors, dated 29 March 2011. The letter of demand, inter alia, required the defendant to withdraw the letter of complaint, tender an apology and pay damages to the plaintiff.

[6] Upon the defendant failing to respond to the letter of demand, the plaintiff then commenced this action.

DECISION OF THE HIGH COURT

[7] The learned High Court judge allowed the plaintiff's claim and ordered the defendant to pay general, aggravated and exemplary damages, totalling RM230,000. In delivering his judgment, Abdul Alim Abdullah J stated:

> 8. ... Mahkamah membuat pendapat defendan dengan hasad yang berlatarbelakangkan faktor-faktor di atas itu telah didorong dengan niat jahat dalam membuat aduan kepada lembaga dan laporan polis berkenaan.
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> 9. Mahkamah membuat pendapat dengan itu, tidaklah terwujud apa-apa 'qualified privilege' sebagai pembelaan di pihak defendan. Jauh sekali defendan tak berkeupayaan untuk berani membela dirinya atas pembelaan 'justification'. Defendan lesu dalam keterangannya berbanding dengan tuntutan-tuntutan plaintif. Cukuplah diperkatakan di sini bahawa defendan tak peduli dan tak menghiraukan kebenaran kedudukan plaintif dan aduan kepada lembaga dan laporan polis oleh defendan jelas sekali bermanifestasikan niat jahat bulat-bulat terhadap plaintif memandangkan kedudukan sosial dan status bisnes plaintif di kalangan komunitinya dan secara amnya.
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> 10. Mahkamah membuat keputusan membenarkan tuntutan plaintif terhadap defendan sepertimana menurut pernyataan tuntutan dalam guaman ini.

DECISION OF THE COURT OF APPEAL

[8] Aggrieved, the defendant then appealed to the Court of Appeal. The Court of Appeal allowed the defendant's appeal with no order as to costs. In delivering judgment of the court, Anantham Kasinather JCA held as follows:

> Absolute Privilege
>
> a) Police Report
>
> 6. We allowed this appeal on the conclusion of hearing submissions because, in our judgment, the law has developed to an extent whereby the contents of a police report and a letter of complaint to the disciplinary board enjoy absolute immunity as opposed to qualified privilege only. ...

[9] The reasons for allowing the appeal may be gathered from the following passage in the judgment of the Court of Appeal:

> 19. We allowed this appeal and ordered the order of the High Court to be set aside on the conclusion of the appeal as, in our judgment, the contents of the letter of complaint and the police report are both not actionable in law for the reasons stated in this judgment. We are conscious that absolute privilege/immunity was not expressly pleaded in the statement of defence. However, in our opinion, para 8 properly understood amounts to a plea that the claim is not maintainable against the appellant. In any event, in our judgment, s 69(4) of the Courts of Judicature Act 1964 confers on this court the power in an appropriate case to allow an appeal on a ground which was not canvassed before the High Court. Since it is now settled law in other jurisdictions that no action for defamation is maintainable in respect of the

contents of a letter of complaint to the DB and a police report save in the limited cases, which are not relevant here, we are constrained to invoke s 69(4) to base our judgment in this case. Since the issue of absolute privilege was raised by the court, we did not order any costs against the respondent. We ordered the deposit to be refunded to the appellant.

[10] In short, the Court of Appeal held that the contents of the police report and the complaint to the DB were both protected by the defence of absolute privilege and hence not actionable in law. Even though absolute privilege was not pleaded by the defendant, the Court of Appeal held that para 8 of the defendant's defence was sufficiently broad to sustain the defence of absolute privilege. In the alternative, the Court of Appeal relied on s 69(4) of the Courts of Judicature Act 1964 ('the CJA') purportedly giving them the power in appropriate cases to allow an appeal on any ground even though it was not canvassed before the High Court.

DECISION OF THIS COURT

[11] Considering the four questions posed to us, we are of the opinion that it is more appropriate for us to first deal with questions (iii) and (iv). We are of the view that, should our answer to these two questions be in the negative, then it won't be necessary for us to answer questions (i) and (ii) as our answer to these two questions would, in the circumstances, be rendered academic.

Powers of the Court of Appeal under s 69 of the CJA

[12] The Court of Appeal relies heavily on s 69(4) of the CJA as giving the Court of Appeal broad powers in dealing with an appeal before it. It will be appropriate therefore to first consider what the said section seeks to provide. It reads:

Section 69 Hearing of appeals

(1) *Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.*

(2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.

(3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

(4) *The Court of Appeal may draw inferences of fact, and give any judgment, and*

make any order which ought to have been given or made, and make such further or other orders as the case requires.

(5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties, although the respondents or parties have not appealed from or complained of the decision. (Emphasis added.)

[13] From the above provision, it is clear that an appeal to the Court of Appeal is by way of re-hearing and the Court of Appeal in exercising its power under s 69 of the CJA shall have all powers and duties, as to amendment or otherwise, of the High Court. In hearing an appeal, it is not improper for the Court of Appeal to draw whatever inferences of facts and make judgments on them. The Court of Appeal may, upon reviewing the facts, arrive at a different conclusion on the primary facts as found by the trial court especially where there has been a non appreciation or a misappreciation of those facts by the trial court.

[14] While it is true that the Court of Appeal can consider a point not expressly taken in the memorandum of appeal or argued in the court below based on the broad wording of s 69(4) of the CJA and r 18(2) of the Rules of the Court of Appeal 1994, this is subject to the overriding discretion of the court to do justice. Where the justice of the case requires a departure from the rule that parties should be bound by the grounds in the memorandum of appeal, the court may allow a new point to be argued (see *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520; *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; [1995] 4 CLJ 127; *Mohd Azam Shuja & Ors v United Malayan Banking Corporation Bhd* [1995] 2 MLJ 851; [1995] 1 CLJ 861). In so doing, it is however not the duty of the Court of Appeal, to invent or create a cause of action or a defence under the guise of doing justice for the parties as it is also trite that parties in litigation are bound by the four corners of their pleadings (see *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188).

[15] What happened in the present case was that the Court of Appeal in the purported exercise of its discretion under s 69(4) of the CJA had substituted the defence of qualified privilege with that of absolute privilege, a defence which was never pleaded nor raised before the High Court. From the authorities set out earlier and the plain reading of s 69(4) of the CJA, the power of the Court of Appeal is only to draw inferences of facts and to make an order which ought to have been made by the High Court. The power is essentially limited to making of inferences of facts from the facts as found by the High Court. This is clearly demonstrated in the case of *Len Min Kong v United Malayan Banking*

Corp Bhd and another appeal [1998] 2 MLJ 478. It is clear from the reading of the said section that it does not confer on the Court of Appeal the power to substitute pleadings of party in any circumstance. To do so would be contrary to the cardinal principle in civil litigation, that parties are bound by their pleadings. As stated by James Foong FCJ in *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188:

> ... the proposition of the Court of Appeal was not even pleaded by the respondent ... parties must abide by their pleadings ... It is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties ...

(See also *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750 (CA)).

[16] Accordingly, we agree with learned counsel for the plaintiff that in the circumstances of the present case, the Court of Appeal had erred and/or misdirected itself in invoking the defence of absolute privilege which was never pleaded nor raised in the trial before the High Court. In the result, our answer to question (iii) is in the negative.

[17] We now turn to question (iv). The issue raised by the plaintiff is that the Court of Appeal in arriving at its decision failed to give the plaintiff the right of hearing. This the plaintiff alleged is supported by the transcript of the proceedings before the Court of Appeal which was made available to us in the core bundle. From the transcript it is indisputable that even though the defence of absolute privilege was raised in the Court of Appeal however it was not fully argued, and as righty contended by learned counsel, the plaintiff was never given the opportunity to submit on the issue. Hence, the plaintiff contended that, in the circumstances, the Court of Appeal had acted contrary to the rules of natural justice and on this ground alone, the decision of the Court of Appeal ought to be set aside.

[18] This is indeed a serious allegation levelled against the Court of Appeal. Having examined the transcript, we notice that what had transpired at the Court of Appeal was that the defence of absolute privilege was only mentioned in passing by learned counsel for the defendant in his closing submission. The court then took a short adjournment, which was followed by their decision. The plaintiff's complaint was that he was never given the opportunity to submit on the issue which was raised for the first time in the Court of Appeal.

[19] Based on the transcript, which is not challenged by the defendant, it is clear that the Court of Appeal failed to give the plaintiff the right to reply on the defence of absolute privilege. In the circumstances we agree with the learned counsel for plaintiff that the Court of Appeal had acted contrary to the rules of

natural justice. In an adversarial system, parties must be given the right of hearing, by that we mean the right to present his case before the court. This is to assist the court in coming to its decision. The danger of the court making decision on its own without hearing parties was highlighted by the Federal Court in *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293, where Zaki Azmi CJ observed at p 302:

> It is therefore dangerous and totally inadvisable, for the court, on its own accord, to consider any point without reliance on any pleadings or submission by counsel appearing before them. If the learned judge thinks there are any points which are relevant to the case before him and which was not raised by either party, it is his duty to highlight that to the parties before him. He must then give an opportunity for both parties to further submit on that particular point (see *Hoecheng Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 at pp 407–409).

[20] In that case, the court had occasion to refer to the case of *Hoecheng Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404, where a similar issue came to be considered by the Privy Council in an appeal from the Court of Appeal of Hong Kong. Lord Mustill in delivering judgment of the Privy Council made the following observations:

> The principles which inhibit the parties from raising new points on appeal, particularly where the fact have not been investigated at the trial, are so well established that it is unnecessary to quote from authorities such as *Tasmania (Owners of) v City of Corinth (Owners of)* (1890) 15 App Cas 223, *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 and *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218. These principles apply equally where it is the court, rather than the parties, which seeks to introduce the new legal issue. If in the present case the matter had been ventilated in open court, it would, their Lordships believe, soon have become apparent that there had been insufficient exploration of the facts at the trial to permit the application of whatever law might have emerged from an examination of the authorities. In the event, however, even this modest examination did not take place. The point appears to have been an afterthought. It does, of course, happen from time to time that a court comes to learn of a statue or authority bearing importantly on an issue canvassed in argument but, through an oversight, not then brought forward. The court may wish to take the new matter into account. Before doing so it should always ensure that the parties have an opportunity to deal with it, either by restoring the appeal for further oral argument, or at least by drawing attention to the materials which have come to light and inviting written submissions upon them. The present case required even more meticulous procedures, for what the court introduced was not new material on the existing issue but an entirely new question of law and fact. The occasions when an appellate court would find it proper even to contemplate such a course after the conclusion of the arguments must be rare, but if it were ever to do so the first step must always be to have the matter thoroughly explored by adversarial means, as regards not simply the merits of the new question but also the propriety of entering upon it at all ...

(See also *Ramanathan a/l Chelliah v Public Prosecutor* [2009] 6 MLJ 215; [2009] 6 CLJ 55).

[21] It is thus clear that whenever the court proposes to consider a fresh issue which the court considers pertinent to the case before it, it should give the parties the right to make submissions on the proposed issue before arriving at its finding. This is fundamental in the adversarial system that we practise in this country.

[22] We would venture to say that, in the present case, the court would have come to a different finding had it given the parties the opportunity to submit on the defence of absolute privilege, which was never pleaded nor raised before the trial court. In invoking the defence of absolute privilege the Court of Appeal failed to give the plaintiff the right of rebuttal. This is a flagrant breach of the rules of natural justice thus occasioning a failure of justice.

[23] For the above reasons, our answer to question (iv) is also in the negative. In view of our answers to questions (iii) and (iv) above, it is, therefore, not necessary for us to answer questions (i) and (ii) as it would have no bearing whatsoever on the outcome of this appeal.

[24] In the upshot we allow the appeal with costs. The order of the High Court is accordingly reinstated.

Appeal allowed with costs.

Reported by Kohila Nesan